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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1571

UNITED STATES OF AMERICA

Respondents

versus

SALVATORE SARULLO, and
GARY M. SOLOMON

Petitioners

SUPPLEMENTAL BRIEF ON THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SIXTH CIRCUIT COURT OF APPEAL

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STATUTES

This is a supplemental brief in support of the Petition for a Writ of Certiorari filed by the Petitioners on June 13, 1975.

I

JURISDICTION

The petition for Writ of Certiorari was filed pursuant to 28 .S.C. Sec. 1254 (1). This supplemental brief is filed pursuant to rule 24 (5) of the Rules of the United States Supreme Court.

The rule is applicable because of the recent decision of the United States Fourth Circuit Court of Appeals in the case of **Phillips v. U.S.**, decided June 3, 1975, number 73-2516. This decision pertains to the issue of Collateral Estoppel and the evidentiary exclusion rule in multpile criminal prosecutions of the same defendant and was not reported until after the Petitioners filed the petition for certiorari on June 13, 1975.

II

ARGUMENT

The en banc decision of the United States Fourth Circuit Court of Appeals in the case of Phillips v. U.S., (4th Cir. 6-3-75, No. 73-2516), lends persuasive weight to the petitioners contention that the petition for a Writ of Certiorari should be granted in order to clarify the present confusion and distinct conflict between the Second, Fourth, Fifth and Sixth Circuit Court of Appeals on the issue of Collateral Estoppel in criminal prosecutions. The Supreme Court should finally decide whether due process requires the exclusion of evidence at a second trial of the defendant on the same or similar offenses which was introduced at a prior criminal trial especially when the first trial resulted in a general verdict of acquittal. **Ashe v. Swenson**, 397 U.S. 436 (1970) and **Sealfon v. United States**, 332 U.S. 575 (1948), while considered the ultimate authority on the issue of Collateral Estoppel, are no longer controlling among the various circuits because of a diversity of judicial opinions by the interpretations given each case in light of Ashe, supra and Sealfon, supra. Thus, the constitutional issue of double jeojardy in regards to Collateral Estoppel

and the implicit due process requirement of fundamental fairness contained in the double jeopardy prohibition is presently in a confused state and the conflicting interpretations by the circuits gives no reasonable guidelines for the various district courts to follow in federal criminal proceedings.

A careful review of the present decisions as stated in the original petition will quickly and clearly reveal the contradictory authority on this vital issue. The Second Circuit would prohibit the introduction of prior admitted evidence at subsequent trials if said evidence pertained to the ultimate issue in dispute on a double jeopardy basis. **United States v. Mallah,** 503 F.2d 1971 (2nd Cir. 1974). The Fourth Circuit has enacted a mutually exclusive offense rule which would prohibit the introduction of some of the same evidence on evidentiary grounds rather than an issue-oriented theory. **United States v. Kramer,** 289 F.2d 909 (2nd Cir. 1961). The Fifth Circuit would prohibit the introduction of all prior admitted evidence on due process grounds. **Wingate v. Wainwright,** 464 F.2d 209 (5th Cir. 1972), and,**Blackburn v. Cross,** 510 F.2d 1014 (5th Cir. 1975). The Sixth Circuit draws a distinction based upon the separate nature of the conspiracies involving the same defendants and would allow the same evidence to be used in the prosecution of both conspiracies in two separate trials. **United States v. Engle,** 458 F.2d 1021 (6th Cir. 1972) **United States v. O'Dell,** 462 F.2d 224 (6th Cir. 1972) and **United States v. Sarullo,** 510 F.2d 1174 (6th Cir. 1975).

The en banc decision of **Phillips v. United States,** supra, reflects the confused and contradictory reasoning. The decision accurately reveals the ultimate irrational-

ity and differences of opinion existing in all the circuits as to when admitted evidence may be used in subsequent proceedings and under what standards may such proof be received.

In the Phillips case, the entire court agred with the original panels conclusion found at 502 F.2d 227, that a defendant could not be tried in separate trials for bank robbery and possession of illicit proceeds from the robbery on the evidence that he participated in the robbery where the core issue of his presence at the bank was found in his favor by the first jury. However, the en banc panel advanced different reasons for their decision.

Three of the judges held that the doctrine of Collateral Estoppel applies so as to prohibit the government at the second trial to offer proof that Phillips was present at the bank during the robbery, even for the limited purpose of showing that Phillips possessed the money with the knowledge that it had been stolen, relying upon the authority of **Ashe v. Swenson,** supra.

Three other judges would reach the same result under the mutually exclusive offense rule of **Mlanovich v. U.S.,** 275 F.2d 716 (4th Cir. 1960), aff'd in part, rev'd n part, 365 U.S. 551 (1961), even though they did not feel like the doctrine of Collateral Estoppel was applicable.

Five members of the panel held that the defendant was estopped from changing his defense at the second trial from that offered by him at the first trial.

The final conclusion of the en banc court can be succinctly stated in two propositions:

1) On the facts of the case, the doctrine of collateral estoppel as set forth in Ashe v. Swenson, does not apply to foreclose any proof by the United States at the Second trial.

2) However, since a majority agreed that as a practical matter, allthough for different reasons, evidence of Phillips participation in the robbery should not be admitted, the district court should exclude it if offered by the United States.

This decision and its inherent contradictory logic is a valid reason for the Supreme Court to resolve the present conflict of authority by deciding that due process requires the total exclusion of all evidence at a second trial which was introduced by the government at a prior trial on same or similar offenses against the same defendants. This is especially true where the first jury found the evidence lacking and rendered a decision of acquittal.

CONCLUSION

Therefore, the Petitioners respectfully request that the Petition for a Writ of Certiorari to the United States Sixth Circuit Court of Appeals be granted for the reasons stated in the original petition as well as the authority in the Supplemental Brief and that the conviction of the Petitioners be reversed and dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Phillip E. Kuhn, being an attorney of record for the Petitioners, do hereby state that I have served three copies of this Supplemental Brief on the Solicitor General of the United States, The Honorable Robert Bork, by placing same in the U. S. mail, postage, prepaid, to his principle office in Washington, D.C. on the 28th day of August, 1975.

Phillip E. Kuhn